October Term, 1952

Nos. 492 - 499

AMERICAN LOCOMOTIVE COMPANY,

Petitioner,

vs.

CHEMICAL RESEARCH CORPORATION,

Respondent.

AMERICAN LOCOMOTIVE COMPANY,

Petitioner,

vs.

GYRO PROCESS COMPANY,

Respondent.

Brief of Respondents in Answer to Petition and Brief of American Locomotive Company for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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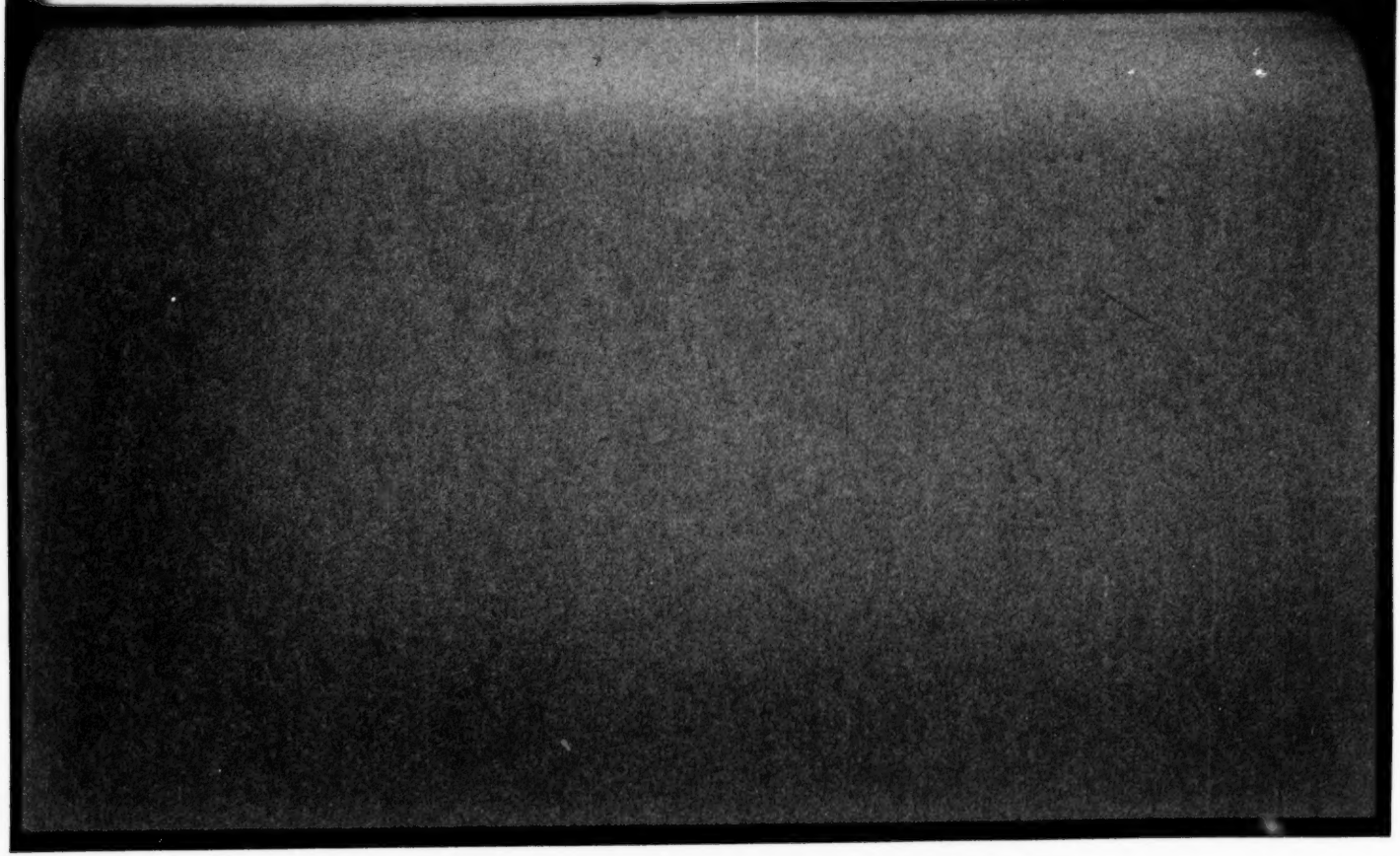

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Brief of Respondents, Chemical Research Corporation and Gyro Process Company, in Opposition to Petition for Certiorari

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OPINIONS BELOW

The order of the District Court comprises a denial of petition by defendant American Locomotive Company, for stay of proceedings pending a requested arbitration (R. 402). The same has not been published in the official re-

ports. It is based upon that court's statements and conclusions printed in the record at pages 387-402, principally upon some seven years' delay on the part of Locomotive Company in requesting arbitration after institution of these suits, with intervening prejudice to the plaintiffs (R. 400-2).

The District Court also expressed his belief that the arbitration provisions of the contract did not extend to the present controversies involving, as they do, malicious or wilful misconduct, or questions of rights or patents (R. 394).

The opinion of the Circuit Court of Appeals has not been officially reported, but is printed in the record at pp. 507-518.

JURISDICTION

Jurisdiction has been invoked by American Locomotive Company under Title 28, Section 1254 of the United States Code.

STATUTE INVOLVED

The statute involved is the United States Arbitration Act (Title 9, U.S.C.A.) copies of Sections 2-6, inclusive, of which are printed in Appendix A to the brief of petitioner Locomotive Company, herein.

GROUND OF DECISION

The ground upon which decision was rested by both the District Court for the Eastern District of Michigan, and the Circuit Court of Appeals, Sixth Circuit, is tersely stated in the opinion of the latter court (R. 517):

> "The question really presented is whether Locomotive was 'in default' in not proceeding with the arbitration after filing its Answer and Counterclaim on Feb. 8, 1941."

The question was *solely one of fact,* no question of law being involved, and both courts found and held as stated by the Circuit Court of Appeals (R. 518):

> "In our opinion the delay on appellant's part in moving for a stay was unreasonable and inexcusable under all the circumstances and constituted 'default' on its part in proceeding with the arbitration."

There exists no basis for this application for certiorari either under the reasons outlined in Rule 38 (5) of the Rules of the United States Supreme Court, or otherwise, or under the principle announced by this court, that on questions of fact this court will follow the findings made by *two lower courts.*

In *Alabama Power Company vs. Ickes,* 302 U. S., 464 (quoting from p. 477):

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as un-

assailable. *Davis v. Schwartz*, 155 U. S. 631, 636-637; *Adamson v. Gilliland*, 242 U. S. 350, 353."

See also:

U. S. vs. O'Donnell (1938), 303 U. S. 501, 508 (condemnation of land);

Texas & No. R. Co. vs. Ry. Clerks, 281 U. S. 548, 558 (citing authorities);

Pick Mfg. Co. vs. G. M. Corp., 299 U. S. 3, 4 (citing authorities);

Brewer-Elliott Oil Co. vs. U. S., 260 U. S. 77.

Defendant-appellant could have presented its application for an arbitration stay promptly after its removal of the cases from the Michigan to the Federal Court on Sept. 4, 1940 (R. 404), and October 11, 1940 (R. v) respectively, and the opinion of the Sixth Circuit (following the decision of District Judge Picard) so found and held in the following language (R. 517-18):

> "The general nature of the action was apparent upon the filing of the original complaint. It could easily determine then whether it wanted arbitration or a trial by jury."

STATEMENT OF CASE

Locomotive's petitions for stay of proceedings for arbitration purposes, were filed in each the Gyro and Chemical cases on March 22, 1948 (R. x, 299, 407, 456).

This filing date was 7 years, 6 months and 22 days subsequent to the commencement of the Gyro suit (R. 1), and 7 years, 9 months and 3 days subsequent to the commencement of the Chemical suit (R. 409).

The original declaration (state court equivalent of complaint) was filed in the Chemical case on June 19, 1940, and Locomotive's original answer and counterclaim and amended answer and counterclaim thereto were filed respectively on February 8, 1941 (R. 404), and November 9, 1942 (R. 407, 417).

No amended declarations or complaints were subsequently filed in plaintiff's behalf in the Chemical case.

In the Gyro case, the original declaration was filed August 30, 1940 (R. 1).

Responsive to motion of Locomotive (R. 16) for a more definite statement or bill of particulars, Gyro filed an amended declaration on June 15, 1942 (R. 102), and Locomotive then filed its motion to dismiss or strike parts thereof. Meanwhile Locomotive filed its answer and counterclaim on February 8, 1941 (R. 33). Thereafter Gyro filed a second amended declaration on September 30, 1943 (R. 125), which was, at that date, its final complaint which

Locomotive so recognized and to which Locomotive secured 40 distinct orders extending time until May 26, 1947, to answer this second amended declaration (R. vi-ix).

Prior to March, 1946, the District Court had set the case for trial (R. 338, 400). But plaintiff's newly retained attorney then made motion to consolidate the two cases and fix the trial date at the June, 1946, term of court. Upon this motion Locomotive objected to consolidation and requested trial of the Chemical case in first order. *Locomotive stated that it was ready to go to trial on March 19, 1946, but if the cases were not then tried, they should go over until the fall, instead of the June, 1946, term* (R. 337, 338). On March 1, 1946, the order of consolidation was entered and the trial date fixed for the fall term (R. ix, 407, 455).

After extensive discovery proceedings on behalf of Gyro and Chemical with respect to Locomotive's books and records (R. 336-337), Gyro, with permission of court and adverse counsel (R. 157), filed its so-called amended and supplemental complaint on December 19, 1947 (R. ix, 158), and Locomotive secured orders extending to March 22, 1948, its time to make answer thereto (R. 157, 297, 298).

On March 1, 1946, an order was entered in District Court consolidating both the Gyro and Chemical cases and resetting the trial date as the 1946 fall term of court (R. ix, 407, 455).

Actual trial at said fall term was not possible in view of defendant's delays in the progress of plaintiff's discovery proceedings (R. 336, 375-386).

In Locomotive's pleadings, etc., prior to March 22, 1948, the arbitration clauses in controversy were pleaded *solely as a bar to suit* (R. 42, 424). No relief was sought in these pleadings under the United States Arbitration Act and no stay was applied for to enable arbitration. The only relief prayed was dismissal of the complaint (R. 43, 425).

Instead the arbitration defense in bar of suit, was joined with *various other defenses on the merits,* including Locomotive's own counterclaims against both Gyro and Chemical (R. 33-49 and 417-434).

When the order for consolidation of the two cases was entered on March 1, 1946, and fall term trial date fixed, Locomotive's attorney, Mr. Meek, did not ask for arbitration stay nor oppose court trial in the usual way, but simply expressed preference for trial of the Chemical case in first order, and preference as to particular trial dates, either on March 19, 1946, or over until the fall term (R. 337, 338).

The gravamen of these suits is the breach of contractual and fiduciary duties by Locomotive Company and its predecessor, Alco Products, Inc., in the performance of their contract to act, among other matters, as Gyro's agents for the licensing and promotion of sales for the use of Gyro's petroleum cracking processes for production of motor fuel and chemical intermediates. As such agents, Alco and Locomotive were required to carry on work for further development of the process and keep the same abreast of the times. Said agents were permitted to enter into their own separate contracts with licensees of Gyro, for the construction of petroleum refining plants (R. 216-224).

Among other transactions under the contract, Alco had sold for Gyro's account, a license to the Argentine Government Oil Fields for the so-called San Lorenzo plant, upon royalty payments to be made by the Argentine to Gyro in the sum of $160,000.00. The last $60,000.00 installment of this royalty was not to be payable to Gyro until after the acceptance by the Argentine of the sufficiency of Alco's plant under the guaranties contained in Alco's separate construction contract (R. 267-269). This plant was tendered for acceptance on March 29, 1938. But the Argentine claimed non-compliance with Alco's guaranties of plant capacity and refused to pay the final $60,000.00 installment to Gyro (R. 176, 317, 318).

In Gyro's first three declarations or complaints herein, Gyro made claim for damages against Locomotive for inability to collect this $60,000.00 installment (R. 6-8; 106-111; and 133-138).

But in May, 1946, Gyro brought suit in the courts of New York State against the Argentine directly for this amount. On June 4, 1946, the Argentine deposited $75,000.00 with the Manufacturers Trust Company of New York, in tendered settlement of the suit with inclusion of $15,000.00 interest from date of March 18, 1942, when the Argentine claimed the plant was finally finished by Locomotive in accordance with guaranties (R. 319, 320).

Gyro accepted this settlement, but Locomotive immediately attached the settlement proceeds in a suit which it then commenced against Gyro in the New York courts. Locomotive's New York suit was based upon the same claims which it was asserting against Gyro in the counter-

claim in the Gyro case below, namely claims for breach by Gyro of the same contract upon which Gyro itself was suing (R. 320).

Locomotive and Gyro then stipulated that the $75,000.00 so attached, be remitted to the United States District Court at Detroit to be held by the clerk of that court for disposition as directed by the final decree in the Gyro case below, and both parties agreed that the determination

> "of the validity, if any, of Locomotive's said claims, together with the determination of the validity, if any, of Gyro's defenses thereto, *including offsets and counterclaims, shall be made by the court in the Michigan case* (i.e., in this Civil Action 2165, the present Gyro suit in the courts below) (R. 321; 349-351)."

While this stipulation provided that the same should be without prejudice to the rights and defenses of either party in the subject matter (R. 351), it nevertheless also provided that the determination of such rights and defenses on the foregoing basis should be made *by the District Court* itself. Specifically the stipulation referred to the pending Gyro suit below and the controversies involved therein, and then stated "that the determination * * * shall be made by *the court* in the Michigan case" (R. 349-350).

The $75,000.00 was accordingly remitted to the District Court below, and is still held by the clerk of that court, to abide its final judgment or decree in the Gyro case (R. 352).

The parties, plaintiff and defendant, in both cases, have each taken discovery proceedings of their adversaries'

records, etc., for use in pleading and for use as evidence in the trial before the court.

For Gyro and Chemical discoveries, see R. 22, 28, 50, 71, 80, 336, 441 and 446, including five sessions in New York City and two sessions in Dunkirk, N. Y.

For Locomotive's discoveries, see R. 96, 101, 436, 448, 450 and 490.

The orders for Locomotive's discoveries were all secured upon its representation that the material solicited, was needed for simplification of the issues and for use as evidence *upon trial before the court.*

For example:

On June 22, 1942, Mr. Meek, attorney for Locomotive Company, in requesting an order for discovery and depositions, stated:

> "Mr. Meek: We ask this, Your Honor, with respect to this case for two reasons: In the first place, we want the depositions so that they can be used at the trial of this case, and we want the discovery so that it can be used for the purpose of preparing for the trial of the case (R. 497) * * *
>
> "The Court: Well, how long will this case take?
>
> "Mr. Meek: Well, Your Honor, how long it takes to try it will depend upon the extent to which we definitely fix the issues of this case before we start the trial, and the extent to which the parties have definitely lined up the evidence that they want to present. Now that is exactly what we have in mind in presenting this petition.

"The Court: Which case do you think should be tried first?

"Mr. Meek: * * * I should think the Gyro case would probably better be tried first * * * Now the thing that we want is to prepare this case in such a way that we aren't going *to be here in the trial of this case* over a period of a couple of years, or that we won't spend some twelve to thirteen days on it (R. 500).

"The Court: Well Mr. Groesbeck (plaintiff's attorney), the court is aware that he (Mr. Meek) is merely stating his side of the case the same as you are. * * * But they have asked for discovery of certain matters, certain of which I think they are entitled to, *and if it is going to expedite the trial of the case, and if I am going to try it without sending it to some other place, the master or somebody to take the testimony, I want to cut it down.*" (R. 505-506).

The order entered the same day granting defendants discovery, appears in the record at page 101.

On January 14, 1946, upon Locomotive's further application for discovery, its attorney, Mr. Meek, advised the court as follows:

"Mr. Meek: So we have filed this discovery with the idea of going over the minutes, agreements, correspondence, etc., before we got into court *so we can save the very time you asked us to save.* * * * Before we start the trial, we want to find out what those facts are, before we get into the trial, and *we can save the court* and ourselves a whole lot of time * * *" (R. 487).

The order in the Gyro case granting Locomotive this further discovery appears at record, pages 490, and see also R. 450 for a similar order in the Chemical case.

In addition to its own utilization of discovery procedure as above, Locomotive took the following, among other, steps in these cases, prior to its application for stay for arbitration, viz.:

Secured order for more definite statement of plaintiff's claim (R. 16, v).

Moved to dismiss, etc., plaintiff's first amended declaration (R. 122).

When plaintiff's newly engaged attorney applied for consolidation of cases, Locomotive announced its readiness to proceed with trial on March 19th, 1946, or in the fall term of 1946 (R. 337, 338).

Allowed plaintiffs to take extensive and costly discovery proceedings in anticipation of trial of the controversies *by the court* (R. 336).

Required deposit of plaintiff's $75,000.00 settlement proceeds from the Argentine, with the clerk of the District Court below in the Gyro case, for the court's determination of the parties' respective rights thereto, including the court's determination of Gyro's counterclaims and offsets to Locomotive's claims to said monies (R. 349, 350).

Locomotive's statement, petition page 7, that plaintiff's amended and supplemental complaint, hereinafter called final complaint—"presented immense areas of new subject matters, claims and issues, some of them arising during the seven years since starting of suit," etc., is completely erroneous.

Plaintiff's original and final complaints are all based upon the contractual relations undertaken between the parties on June 16, 1932.

Counts I and II of the final complaint, seek exactly the same relief as sought in the first declaration, except only that the final Count I *reduced* the claims of original Count I, by credit for the Argentine 1946 settlement recovery. (Compare R. 6-11 with R. 173-186.)

Count III of the *first* declaration concerning defendants' obligations for the sale of licenses and development of the Gyro process, sought recoveries, viz.:

(a) For defendants' failure to undertake aggressive action to sell licenses and use best efforts to develop and strengthen Gyro's patent position (R. 12).

(b) For defendants' failure to keep the process abreast of the times and properly developed (R. 12).

(c) For defendants' failure to hold for Gyro's benefit and, on the contrary, transferring to other persons, firms and corporations, defendants' inventions and improvements, etc., to the process and art of vapor phase cracking properly belonging to plaintiff (R. 12-13).

Count III of the *final* complaint simply itemizes defendants' improvements, etc., to the process and alleges, among other items, conversion thereof and conversion of plaintiff's own know-how, etc., by transfer, disclosure and conversion of the bulk of the same in year 1939, and subsequently, to Stone & Webster Engineering Corporation (R. 187-202). Reference is made in the final count to the value of said transfer, in light of World War II usage (R. 193),

but the conversion complained of is a particularized description only of the more general allegations on the same subject matter contained in paragraph 1 (c) of the original Count III (R. 12-13).

Count IV of the final complaint (R. 200-202), merely amplifies details of paragraph 1 (b) of original Count III (R. 12), as to the failure of defendants to keep the process abreast of the times.

Count V of the final complaint (R. 202-210), merely gives the details of plants constructed by defendants within the scope of paragraphs 1 (c) and 1 (d) of original Count III (R. 12-13), with respect to which defendants utilizing their improvements, etc., to the Gyro process, or utilizing other cracking processes, failed to protect Gyro's royalty rights therein.

Count VI of the final complaint (R. 210-215), seeks principally the transfer to Gyro of certain patents and improvements secured or developed and still retained by defendants within the scope of paragraph 1 (c) of original Count III (R. 12-13), together with damages for defendants' failure to disclose to Gyro information as to defendants' activities and process improvements under said agency contract within the scope of paragraph 1 (c) of original Count III (R. 12-13).

The Circuit Court of Appeals was wholly warranted in its statement (R. 517-18):

> "The general nature of the action was apparent upon the filing of the original complaint."

ARGUMENT

POINT I

The Court of Appeals did not commit error in holding (affirming the District Court) that Locomotive Company was in default under Sec. 3 of the United States Arbitration Act in its proceeding for arbitration.

1. The Arbitration Act specifies the procedure for relief under Sec. 3, as an "application" (to) stay the trial of the action until "arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*"

Title 9, U.S.C., Sec. 3, in part.

Section 6 of the Act provides that any application to the court under the Act shall (with exceptions immaterial here) be made and heard in the manner provided by law for the making and hearing of motions.

Title 9, U.S.C., Sec. 6.

When Locomotive, on March 22, 1948, finally made its motion for stay of proceeding, it purported to follow the above procedural requirements (R. 299, 456).

But this motion did not come until the lapse of 7 years, 6 months and 22 days in the Gyro case and lapse of 7 years, 8 months and 3 days in the Chemical case, after the dates of commencement of said cases respectively (R. 1 and 409).

These cases were both removed by Locomotive from State Court to Federal Court on dates of October 11, 1940 (R. v), and September 4, 1940 (R. 404), respectively, and the time intervals between dates of filing the transcripts in Federal Court and date of motions for arbitration stay, were 7 years, 5 months, 11 days and 7 years, 6 months and 18 days, respectively.

Locomotive could have presented its application for an arbitration stay promptly upon its removal of the cases to the Federal Court, and the opinion of the Circuit Court of Appeals (following Judge Picard; R. 400) very properly held in the following language (R. 517-18):

> "Nor was it at all necessary for Locomotive to wait to make such a motion until the amended and supplemental complaint was filed. The general nature of the action was apparent upon the filing of the original complaint. It could easily determine then whether it wanted arbitration or a trial by jury.
>
> "In our opinion, the delay on appellant's part in moving for a stay was unreasonable and unexcusable under all the circumstances and constituted 'default' on its part in proceeding with the arbitration."

However, in both cases, Locomotive filed its answers to the merits of controversy, *alleging the arbitration clauses as grounds only in bar and for dismissal of suit* (R. 42-3, 424-5). In said answers defendants included other and special defenses on the merits as itemized on R. 40-3, 421-5, and also counterclaims in each instance (R. 43-9, 425-434).

With the pleadings in such shape, Locomotive allowed the District Court and the plaintiffs to beleive for more than seven years that Locomotive intended to submit the

controversies to court trial, all as indicated by Locomotive's conduct of the case as follows:

Applying to the court for an order requiring plaintiff to make more specific statement of its claims.

Allowing plaintiffs to engage in extensive discovery proceedings preparatory for court trial instead of such preparation as would have been appropriate to arbitration.

Securing Locomotive's own discovery of plaintiff's records, evidence, etc., for *avowed purposes* of an actual court trial.

Formulating case pleadings with reference to court trial—not arbitration.

Presentation of the arbitration defense as a court question only, for complete dismissal of suit, without intimation of any intention to seek an arbitration under the United States Act or otherwise.

Consenting to or securing the designation of dates for actual court trial upon the issues framed as above.

Filing pleadings, making upwards of 10 motions, taking the time of the court and counsel upon upwards of 20 occasions, on hearings, arguments, etc., presenting for signature upwards of 50 orders and securing from plaintiff 42 extensions of time within which defendant could file its "responsive pleadings" or "Answers," instituting two separate suits in the U. S. District Court for the Eastern District of Michigan against the Chemical Research Corporation and the Gyro Process Company and their officers and directors, and also instituting an attachment suit in New York City, all of these suits based upon the same identical claims at issue in

the instant case, and by advising the court that it wanted discovery in order to "save a lot of time or we can wait until the trial and then before the jury and the court," etc. Applications for stay of proceedings are neither "responsive pleadings" nor "Answers," Rule 7 (a) and 12 (B), Rules of Civil Procedure.

Requiring the deposit into District Court below of Gyro's $75,000.00 Argentine settlement monies with written consent that all controversies between the parties concerning the subject matter thereof, be determined by the Dsitrict Court, with no mention of arbitration.

2. This course of conduct falls within the holding of the Fourth Circuit Court of Appeals where defendant was found in default under Sec. 3, viz.:

> "(3) Here when the plaintiffs chose to ignore the arbitration clause in the sales contract the defendant did not immediately, as was its duty if it intended to rely on the arbitration clause, assert its intention to enforce the arbitration; on the contrary, the defendant appeared and filed an answer to the complaint and set up a counterclaim for a large sum as damages claimed to be due to defects in the goods purchased. More than three months after this was done the defendant appeared and filed a written motion for continuance on the ground that a material witness was absent and upon showing the continuance was granted. It was only after the expiration of another six months, and on the day expressly agreed on as the day when the trial should be had, that the defendant, without giving notice, filed its motion to stay the trial pending arbitration, which it then sought to enforce.

> "By its course the defendant waived its right under the arbitration clause in the contract and was in default in proceeding with arbitration. * * *"
>
> *Radiator Specialty Co. vs. Cannon Mills, Inc.*, 77 Fed. 2d. (C.C.A. 4) 318, 319.

Contrasted with defendant's 9 months' delay, counterclaim on the merits and single motion for continuance of court trial in the Radiator case, the Sixth Circuit in the instant case most appropriately held:

> "In our opinion, the delay on appellant's part in moving for a stay was unreasonable and unexcusable under all the circumstances and constituted 'default' on its part in proceeding with the arbitration." (R. 517-8).

In the instant case, over seven years' delay has intervened, together with contests concerning the form and sufficiency of plaintiffs' pleadings; also expensive and protracted discovery proceedings have been had on both sides to secure evidence for *avowed purpose* of court trial. The issues of controversy including defendants' own counterclaim, were all framed in form for court trial; and announcement was made by Locomotive of its readiness for court trial on date as previously fixed (R. 337-8; 400). Furthermore, Locomotive started its own affirmative suit in New York State Courts against Gyro *upon the same subject matter in controversy in the present case*, and insisted as condition for discontinuance of the New York suit, that Gyro deposit the $75,000.00 Argentine settlement proceeds with the clerk of District Court below, *for that court's determination of said controversy*. See supra, pp. 8-9, 12.

In a case from the Fifth Circuit, four years' delay by plaintiff in application for arbitration in a suit which plaintiff itself had commenced, was held to constitute default.

> *La Nacional Platenara vs. North American Company*, 84 Fed. 2d (C.C.A. 5) 881.

Locomotive's authority, *Kulukundis vs. Amtorg Trading Corporation* from the Second Circuit Court of Appeals, holding that defendant Amtorg was not in default in proceeding with arbitration is not in conflict with the present holding of the court below. Amtorg, within 9 months from date of its original answer, filed its amended answer, containing, as shown by the opinion at page 989, a motion for arbitration. But the court rested its decision favorable to defendant on the finding that during said 9 months' interval:

> "*no steps of any importance (had) meanwhile occurred in the suit*" • • • (Opinions, pp. 980, 989).

Nor does the Shanferoke case, cited by Locomotive, from the Second Circuit, affirmed by the Supreme Court, conflict with the decision below.

In the Shanferoke case, the Supreme Court affirmed allowance by the Court of Appeals, of Section 3 arbitration to defendant, over plaintiff's objection of waiver and unreasonable delay.

The basis of this decision appears from the following excerpt from the Court of Appeals opinion:

> "The plaintiff further objects that the defendant is 'in default in proceeding with such arbitration' within the meaning of Section 3. True, it has not

named its arbitrator, but in its answer and moving affidavits has merely expressed its willingness to submit to arbitration. This appears to us enough. • • •

"The stay should be granted, *but the District Court will be free without the leave of this court to vacate it at any time, should it appear that the defendant is in default in proceeding with the arbitration.*"

Shanferoke Corp. vs. Westchester Corporation,
70 Fed. 2d (C.C.A. 2) 297, 299.
Affirmed 293 U. S. 449.

No question of unreasonable and prejudicial delay in the *Shanferoke* arbitration was involved, but even so, the court order provided protection to plaintiff in event that defendant might afterwards fail to pursue arbitration diligently.

Nor does the *Almacenes-Golodetz* case, also from the Second Circuit, conflict with the decision below.

There, Almacenes as purchaser of caustics had brought suit against Golodetz as seller for latter's misrepresentations as to the merchantable containers in which the caustics were shipped. Golodetz, as defendant, filed a counterclaim alleging that the contract of sale contained clauses providing that disputes should be settled by arbitration in New York under the rules of the American Arbitration Association, and that defendant had always been willing to arbitrate, but that plaintiff had broken its agreement so to do and was in default. The counterclaim not only prayed that the action be stayed and plaintiff be directed to arbitrate, but also alleged failure of plaintiff to give timely notice of contract breach.

Some six months later Golodetz filed a supplemental motion for an order staying action and requiring plaintiff to arbitrate. In this interim Golodetz had endeavored to join several third parties defendant against most of whom the complaint had been dismissed. The motion for arbitration was then granted by the District Court.

In affirming, the Court of Appeals stated:

> "* * * In *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 2 Cir., 126 F. 2d 978, * * * we held that there had been no waiver of the arbitration clause by answering the libel without insisting upon arbitration until the attempted amendment, *no 'steps of any importance having occurred meanwhile in the suit.'* In the instant case the answer did show that Golodetz & Co. relied upon the arbitration agreement, and unless its action in bringing in third party defendents amounted to a waiver it did not lose the benefit of that defense. * * * Those third party defendants were not parties to the arbitration agreement between the plaintiff and Golodetz & Co., and the latter's assertion of rights brings all parties in interest into court where their rights and liabilities could be adjudicated, if necessary, in proceedings following the termination of any stay granted pending arbitration. Such action did not indicate an intention on the part of Golodetz & Co., to abandon its right to insist on arbitration, which it had already alleged as a defense, and so fell short of a waiver of it."
>
> *Almacenes Fernandez S. A. vs. Golodetz,*
> 148 Fed. 2d (C.C.A. 2) 625, 628.

The Almacenes decision depended upon the entire consistency between defendant's interim proceedings and retention of right to arbitrate. But in the instant case,

Locomotive's interim proceedings were consistent only with trial of the case by the court—*in lieu of arbitration.*

Each of these cases was decided upon its particular facts. In the Radiator and Platenara cases the facts adduced were found to constitute default. In Kulukundis, and Shanferoke and Almaccnes cases the facts did not constitute default.

However, in the instant case, two courts have reached the same decision on the overwhelming facts, viz., that defendant is in default.

This situation presents no ground for certiorari.

Locomotive's attempts variously to avoid consequences of its own clear-cut expressions of intent to try these cases before the court, are not tenable:

(a) The claim that Locomotive was prevented from filing motion under Section 3, by reason of the District Court's freeze order in plaintiff's favor, is false.

The District Court, when staying proceedings pending discovery for filing plaintiff's responsive pleading to defendants' counterclaim, specifically stated that said stay should not prevent defendants, including Locomotive, from filing any other motions or pleadings, viz.:

> "I am not going to prevent either party from filing any motions or any pleadings that they want." (R. 482).

Locomotive had no misapprehensions as to Judge Picard's purposes concerning the stay order as thus expressed. Locomotive, pursuant to such understanding and during the period of continuance of said stay order, made the following among other motions in the Gyro case:

> For depositions and discovery (securing broad order for the same). (R. 96, 101.)
>
> To dismiss amended declaration or strike parts thereof (R. 122).
>
> To cancel bond releasing garnishment (R. vi).
>
> For taking further depositions and discovery on January 29, 1946 (and securing broad order for same). (R. vii, 490.)

The time of the court was taken up on many hearings on these motions.

Furthermore, said March, 1941, stay order was never once mentioned in the District Court below as an excuse for Locomotive's failure to make a motion for arbitration stay.

For example:

After the motion for arbitration had finally been made in April, 1948, Judge Picard, at the hearing thereon, questioned Locomotive's attorneys as to the reasons for delay, as follows:

> "The Court: Why haven't you had arbitration in the meantime?
>
> "Mr. Meek: I don't know." (R. 387).

The Sixth Circuit's own statement, at p. 517, is wholly warranted, viz.:

> "Nor do we give much consideration to Locomotive's contention that the court's order of March 17, 1941, prevented it from making the motion for a stay. It was clear from the statement of the district judge at the time that appropriate motions would still be received and considered. Numerous motions were thereafter actually made and passed upon. In any event, the order staying proceedings *in this case* during discovery, is not reasonably susceptible of a construction that would bar a motion to stay all proceedings in the same case."

(b) The inclusion in Locomotive's original answers of arbitration as a plea in bar, for the purpose of securing dismissal of suit, does not save its rights under the Arbitration Act.

As stated in the Kulukundis case hereinafter mentioned:

> "The Arbitration Act has eliminated the hostility to an executory agreement coming within Section 2, and, *while not making it a basis for a plea in bar*, now permits it to be made a basis of a stay order."

Kulukundis vs. Amtorg Trading Corp.,
126 Fed. 2d (C.C.A. 2) 978, 979.

From the foregoing, it is clear that a plea of arbitration in bar is not a good substitute for stay motion under the Act. Plea in bar gives no adequate notice to the court or adverse parties that actual arbitration is intended, so as to direct such adversaries' preparation towards arbitration, instead of trial.

See also the following from a Pennsylvania Federal District Court:

> "It should be noted preliminarily that the procedure provided in * * * the United States Arbitration Act, 9 U.S.C.A., Sec. 1 et seq., in cases where suits are instituted upon matters referable to arbitration under a written and enforceable arbitration agreement, is an application for stay of trial of the action until the arbitration has been had in accordance with the terms of the agreement * * * 9 U.S.C.A., Sec. 3. *Neither the state nor the federal statute provides for dismissal of the actions commenced in violation of arbitration agreements.*"
>
> *Karno-Smith Co. vs. School Dist.*, 44 Fed. Supp. (D. C. Pa.), 860 at 862.

And even in New York, where the statute is not as explicit as to the formal requirements for preservation of arbitration rights, the court has held that a defendant pleading arbitration in bar, must proceed promptly thereafter with his actual motion for arbitration, viz.:

> "Unreasonable delay in making the proper application may justify a finding of waiver. While the agreement to arbitrate is not itself properly pleaded either as a defense or a counter claim, when pleaded, it is no less an assertion that defendant does not intend to abandon his rights and so rebuts any inference that would otherwise be drawn from the mere service of the answer. * * * *But the arbitration law contemplates prompt action and too long a delay in seeking appropriate relief may be easily construed as an indication that this claim is waived.*
>
> "Upon the record before us the Appellate Division may have affirmed the order of the Special Term * * * because of the great delay on its part it intended to

waive what would otherwise have been its right. In view of this possibility, we may not interfere with the result reached by it. * * *

"Order affirmed."

Nagy vs. Arcas Brass & Iron Co.,
242 New York, 97 at 98, 99.

(c) Contrary to claims in its certiorari brief, pp. 28, et seq., Locomotive's discovery efforts prior to March, 1948, were not directed towards an actual arbitration of the controversy. They related instead towards the proof of the special defense that plaintiff was not entitled to maintain suit, toward the end of securing complete dismissal of suit.

The special defense so reads:

"that no such arbitration has been had or demanded * * * and *that plaintiff accordingly is not entitled to bring this action* (R. 42, 424) * * * *wherefore these defendants "demand" that the complaint herein be dismissed"* (R. 43, 425).

Locomotive's attorney characterized this defense as follows:

"Mr. Meek: We set up arbitration as a defense, *as a condition precedent to suit* (R. 388).

As late as 1946, when seeking further discovery in support of said defense, Mr. Meek further stated:

"Mr. Meek: That is what we want to do in this case. *Before we start the trial* we want to find out what those facts are, *before we get into the trial,* and

we can save the court and ourselves a whole lot of time. Of course what we don't get on discovery in advance, it will have to be done that way *during the trial.* The more we can limit that the better (R. 487).

* * * * *

"Mr. Meek: We want the contract proviso, Your Honor, if any of these parties were dissatisfied with the way * * * Alco performed the contract after a two year period, that Gyro or Chemical, or Pure Oil could call for an arbitration of that question, and that arbitration should decide whether or not there had been a breach of the agreement by Alco, * * *

"Mr. Meek: * * * There were three parties could seek the arbitration, Gyro, Chemical and Pure Oil. *We couldn't seek arbitration; they could.* We want to know what correspondence there was between any of those parties relative to arbitration of the alleged breach" (R. 489).

Right up to March, 1948, Locomotive took the position that it would not or could not, upon its own initiative, invoke arbitration—but was utilizing the arbitration clause simply *as bar to suit.* The claim otherwise at this time is incredulous, to say the least.

(d) Locomotive's claim that plaintiffs' Amended and Supplemental Complaint reopened Locomotive's election to arbitrate is also untenable.

Plaintiff's 1947 complaint, filed with permission of the court and consent of adverse counsel, introduced no new issues or controversies, see supra, pp. 12-14. *It merely reiterated the original issues concerning which Locomotive had expressed content to accept trial of the same before the court itself.*

The two lower courts specifically so held.

POINT II

There is no conflict between the decisions of the Court of Appeals in the instant case and the decisions of the Supreme or other Circuit Courts.

In this brief, at pp. 18-23 supra, the supposedly conflicting citations as claimed by Locomotive are analyzed and shown to be wholly consistent with the decision under present consideration. *The different results of such decisions were all reached upon important differences of fact, not difference in the enunciation of principles of law.*

But Locomotive claims that the Court of Appeals below expressly admitted conflict in its use of the term "default" as contrasted with the Second Circuit Court of Appeals, in the Kulukundis case. This is absolutely incorrect.

The attempt of Locomotive, in its brief, to pin the Second Circuit Court of Appeals to a restricted definition of the word "default" betrays a complete misconception of the holdings of that court.

The Kulukundis case does not support or warrant any restricted definition of the term "default." That court, in one reference in its opinion, p. 989, applied the word "default" to situations where a party has refused either: first, to institute an arbitration proceeding; or, second, refused to proceed with arbitration when once commenced. However, the Second Circuit did *not* restrict the meaning of "default" to such situations, but on the contrary ex-

pressly stated both in the two following paragraphs, and on page 980, that a third situation might arise where one party, having brought a court suit upon an arbitrable controversy, his adversary may thereupon accept the propriety of such suit and thereby waive arbitration. Upon the facts of the Kulukundis case the court held no such waiver was there to be found, for the reason that:

> *"no important intervening steps had been taken in the suit and no one had been affected by the delay"* (R. 989).

The court also commented to the same effect in its opinion on page 980, second column.

The Kulukundis opinion recognized the validity and soundness of *Radiator Specialty Co. vs. Cannon Mills* (4th Circuit), 97 F. 2d 318, in which defendant's waiver of arbitration had been established by the filing of answer and counterclaim and motion for continuance of trial. The court analyzed and distinguished the facts of that case from Kulukundis.

> NOTE: In the instant case the facts establishing Locomotive's waiver are much more aggravated and decisive than even in the Radiator case—see supra, pp. 5-12, 15-18, 24, 27-8.

The Second Circuit, in its subsequent decision in *Almacenes vs. Golodetz*, 148 F. 2d (2nd Cir.) 625, et seq., again affirmed the doctrine of waiver in the following language:

> "If one party does bring suit and the other party answers the complaint on the merits instead of relying upon the arbitration agreement, their conduct in so doing may amount to a waiver which will bind

them both. *Galion Iron Works v. J. D. Adams Co.*, 7th Cir., 128 Fed. 2d 411" (627).

"In *Kulukundis Shipping Co. v. Amtorg Trading Corporation* * * * we held that there had been no waiver of the arbitration clause by answering * * * without insisting upon arbitration until the attempted amendment, *no 'steps of any importance having occurred meanwhile in the suit'.*" (628).

The Sixth Circuit, in its decision in the instant case, followed the principle of law laid down by the Second Circuit in the Almacenes case.

There is, therefore, no conflict of law between the decisions of the Second and Sixth Circuits, nor between the Sixth Circuit and any other Circuit, or between the Sixth Circuit and this court.

POINT III

Answers to Certain of the Misleading Statements Contained In Petition and Brief of Locomotive.

The petition and brief for certiorari filed by Locomotive is replete with partial, misleading and incorrect statements.

We cannot, within any reasonable compass, attempt to answer all of them in detail. But a few instances may be briefly pointed out:

1. Locomotive endlessly alleges that plaintiffs have enlarged the nature and scope of, or added new issues to its complaint, and has included matters which have occurred since the commencement of the case, and that plaintiffs have purposely kept the case in its pleading stage. This is absolutely incorrect. Upon the contrary, plaintiff's entire case as set forth in the original complaint (Declaration) and in all subsequent amendments, is based upon the contractual relations between the parties as entered into June 16, 1932, and upon Locomotive's breaches of its duties and obligations, fiduciary and otherwise, thereunder. Locomotive moved for and secured an order on December 2, 1940, for a more specific statement (R. 16-22). Inasmuch as practically all of the information relative to such breaches and misconduct was in the possession of Locomotive, plaintiffs were obliged to secure as much of it as was possible by discovery proceedings. These were made as difficult and expensive as possible by Locomotive (R. 80-95, 375-86),

necessitating court hearings and orders and many trips to New York City and Dunkirk, N. Y. Resulting from discoveries thus extracted, Gyro, with the permission of the court, filed on December 19, 1947, its amended and supplemental complaint, in which it merely amplified and detailed the allegations supporting the breaches charged in the original complaint. This would have been accomplished very much earlier had Locomotive properly obeyed the court's orders for discovery.

The language of the Circuit Court of Appeals (R. 517-8), tersely and completely disposes of this claim now advanced by Locomotive:

> "The general nature of the action was apparent upon the filing of the original complaint. It (Locomotive) could easily determine then whether it wanted arbitration or trial by jury."

2. Locomotive incessantly alleges that it *promptly* pleaded arbitration in its answer. It however deftly evades stating that it did so only as a plea in bar of and for the complete dismissal of the entire action, which under the authorities it could not do.

The Circuit Court of appeals effectively demolishes this claim as follows (R. 516-17):

> "Although Locomotive pleaded its contract right of arbitration *it was pleaded as a bar to the action with no reference to the provisions of the Arbitration Act. Under the Act arbitration is not a bar, and in order to obtain the benefits of the provisions of Sec. 3 thereof, further action is necessary. Karno, Smith Co. v. School District*, 44 Fed. Supp. 860-862."

The discovery proceedings disclosed that Locomotive and its transferees are still using plaintiffs assets, rights and properties and are therefore enjoying the emoluments attendant upon such use following their conversion by Locomotive. This does not present any new issues, but goes to the question of damages and is so pleaded by plaintiff as it has the right to do. Damages accruing not only during the pendency of the suit but also in futuro are properly pleadable, provable and recoverable (R. 326-27).

3. Locomotive tirelessly repeats that it is now and always has been ready, willing and desirous of having all the issues involved in this action submitted to arbitration, etc.

If so, Locomotive has so successfully concealed such desire from 1940 to March 22, 1948, that no inkling, let alone evidence thereof, can be found at any place in the record. Defendants' answer and cross-complaint (R. 33-49), casually refers to the so-called arbitration provisions of the contract of June 16, 1932 (on R. 42), but does not demand nor express any desire to have arbitration of any character either under the U. S. Arbitration Act or otherwise. On the contrary it alleges solely (R. 42):

> "That no such arbitration has been had or demanded by Gyro Process Co., plaintiff herein, and that *plaintiff accordingly is not entitled to bring this action* * * * (R. 43). *Wherefore these defendants demand that the complaint herein be dismissed, etc.*"

That a plea in bar is not an application for arbitration see authorities, pp. 25-6-7, supra, nor is it any expression of willingness or desire for arbitration.

This plea in bar of the action has never at any time nor by any reference to be found in the record been altered from the date of filing the answer and counterclaim on Feb. 8, 1941, until March 22, 1948 (R. 456). During the intervening seven years, Locomotive had instituted and participated in the multitudinous court proceedings hereinabove referred to and enumerated.

Nothing can be clearer than that this present expressed desire for decision by arbitration is merely an afterthought.

Certainly neither plaintiff nor the District Judge would have granted upwards of 40 stipulations and orders extending defendants time to *answer* plaintiff's complaint, nor would they have expended the time of the court and counsel in upwards of 20 other hearings, arguments and discussions, nor have gone to the expense of lengthy discovery proceedings merely for the purpose of permitting defendant *thereafter* to apply for a stay of proceedings for arbitration.

The District Judge, after vainly asking Locomotive for its reasons for such concealment and delay, very properly excoriated defendant therefor (R. 393-4, 400):

Page 393:

> "The Court: And nothing was said to me about arbitration during all this period. Now, when I happen to tell you you are going to try this case in the fall and you have to be ready for it—and you knew all the time that these people have gone ahead here and gotten a new attorney who has spent a lot of time

—suddenly you come up with a desire for arbitration."

Page 394:

"The Court: All right, go ahead. Give me some reason why this comes to me as a virgin blow at this time to deprive me of this right I have been looking forward to for seven years to decide this lawsuit; and now I also learn there is going to be a jury demanded.

* * * * *

"The Court: The point you haven't answered yet is why you haven't brought this before the court long ago. It isn't a case of eight days or eight months, it is almost a case of eight years.

Page 400:

"The Court: * * * All of this time these people are going to this expense, going to Dunkirk, you permit them to go to Dunkirk, New York, the attorneys, and spend all that time getting witnesses, going to the trouble of getting records that you say would fill this court, *when eight years ago, and every day during those eight years you could have come into this court and said*: 'Your Honor, let's settle this point. We claim this matter should be determined by arbitration and that it has to be.' *But you didn't do that.* You know I am going to force you on in October, and for the first time in eight years I am confronted with your position that it is mandatory to have arbitration.

"Well, gentlemen, I am not going to argue any longer. I deny the motion, and you better get ready in the fall."

We therefore submit that there exists neither legally nor otherwise any basis for review by certiorari and ask dismissal of the petition therefor.

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